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In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CLAYTON J. POWELL AND DARLENE W. POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, under Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212, a notice of deficiency mailed by the Internal Revenue Service to the taxpayers' last known address is sufficient to permit the valid assessment of taxes if (i) the notice is mailed after the taxpayers have moved from that address, (ii) the taxpayers do not receive the notice, and (iii) the Service does not thereafter issue an additional notice to the taxpayers' new address.

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 958 F.2d 53. The opinion of the Tax Court (App., *infra*, 12a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. A petition for rehearing with suggestion for rehearing en banc was denied on May 13,

1992 (App., *infra*, 15a-16a). On July 31, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 6212, 6213 and 6503 of the Internal Revenue Code, 26 U.S.C. 6212, 6213, 6503, are set forth in the Appendix (App., *infra*, 17a-19a).

STATEMENT

This case concerns whether the Internal Revenue Service failed to issue a "notice of deficiency" to the taxpayers at their "last known address" (26 U.S.C. 6212(b)(1)) and, as a result, is now barred from assessing and collecting the taxes due.

1. When the Internal Revenue Service determines that a taxpayer owes additional income taxes, the Service ordinarily must issue a "notice of deficiency" before it may assess and collect the taxes. The "notice of deficiency" sets forth the amount of, and reasons for, the additional taxes due. Under Section 6212 of the Internal Revenue Code, a notice of deficiency mailed by certified or registered mail to the taxpayer "at his last known address" is "sufficient" (26 U.S.C. 6212(b)(1)).

From the date that the notice "is mailed," the taxpayer has 90 days to petition the Tax Court for review of the asserted deficiency. 26 U.S.C. 6213(a). During that 90-day period (and, if a timely petition for Tax Court review is filed, until conclusion of the Tax Court proceedings), the Service ordinarily is

barred from assessing or collecting the taxes. *Ibid.*[1] On the 91st day after the "notice of deficiency" is mailed, however, if a Tax Court proceeding has *not* been commenced, the Service may assess the taxes and commence judicial and administrative collection procedures.

2. a. On February 29, 1988, the Maryland Revenue District of the Internal Revenue Service issued a notice of deficiency to respondents in connection with their 1984 federal income taxes.[2] The notice was sent by certified mail to the address shown on the income tax return that respondents had filed for 1986, which was, at that time, the most recent of respondents' returns that had been processed by the Service (App., *infra*, 12a; C.A. App. 103-106).[3]

Respondents had moved from that address in 1987, however, and they did not receive the notice of deficiency because the Post Office did not forward it to their new address. According to the local postmaster, the Post Office instead marked the notice as "un-

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[1] During the period that assessment is thus barred, the three-year statute of limitations for assessment is tolled. See 26 U.S.C. 6503(a)(1). There are exceptional situations involving "termination assessments" and "jeopardy assessments" where the Service is not barred from assessing and collecting taxes pending Tax Court review. See 26 U.S.C. 6213(a), 6851, 6852, 6861. These exceptions are not involved in this case.

[2] As authorized by 26 U.S.C. 7621, there are 61 Revenue Districts, each of which covers a State or a geographic fraction of a State. Treas. Dep't Order No. 150-01 (filed July 10, 1986), 51 Fed. Reg. 25,284 (1986). The Revenue Districts deal with federal tax matters primarily on a local or taxpayer level. See 26 C.F.R. 601.105(b).

[3] "C.A. App." refers to the joint appendix in the court of appeals.

claimed" and returned it to the Service (App., *infra*, 3a). The Service, however, has no record of its return (*ibid.*).

b. Respondents filed their 1987 income tax return with the IRS Philadelphia Service Center on February 11, 1988, eighteen days *before* the notice of deficiency was issued. Although their 1987 return showed respondents' new address, that return had not been processed (and the new address had therefore not been input into IRS files) by the date that the notice of deficiency was issued (App., *infra*, 12a; C.A. App. 105-106).[4]

c. Ninety days after the notice of deficiency was mailed by the Service, respondents had not filed a petition in the Tax Court and the Service therefore assessed the deficiency and made demands for payment (C.A. App. 56).[5] When respondents received those demands, they filed a petition in the Tax Court seeking review of the deficiency (C.A. App. 5).[6] Re-

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[4] The Service receives and processes millions of individual tax returns each year. Under its standard procedures, returns seeking refunds are processed first, before returns containing additional tax payments are processed (C.A. App. 105-106). Because respondents' 1987 return contained an additional payment, it was not processed—and respondents' new address was not input into IRS files—until June of 1988, four months after the notice of deficiency was issued (*ibid.*).

[5] After respondents' 1987 return was processed in June 1988, and their new address had been entered into the Internal Revenue Service's computer files (see note 4, *supra*), the Service issued notices demanding payment to respondents' new address (C.A. App. 106).

[6] Respondents also filed suit in the United States District Court for the District of Maryland, seeking an injunction

spondents asserted that assessment and collection of these taxes was barred by the statute of limitations because the assessment that was made had not been preceded by a valid notice of deficiency mailed to their "last known address" and the time for further assessment had expired (*ibid.*).

3. The Tax Court dismissed respondents' petition because it was filed more than 90 days after the notice of deficiency was mailed by the Service (App., *infra*, 12a-14a). See 26 U.S.C. 6213(a) (the petition must be filed "[w]ithin 90 days * * * after the notice of deficiency authorized in section 6212 is mailed"). The court concluded that the notice of deficiency that had been mailed to respondents on February 29, 1988, satisfied the requirements of Section 6212 because the address to which the Service mailed the notice was respondents' "last known address" at the time it was mailed. The court noted that the Service is not required to establish that the notice was actually "received" (App., *infra*, 13a). The court further emphasized that it has consistently been held that the Service is entitled to "a reasonable period of time in order to process a Federal tax return" and to incorporate any change-of-address information contained in new returns into its files (*id.* at 12a). The court found that the 18-day period between February 11, 1988 (when the Philadelphia Service Center received the 1987 tax return listing respondents' new address), and February 29, 1988 (when the Baltimore office of

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against collection of the taxes (C.A. App. 192-198). The district court denied respondents' request for an immediate hearing (C.A. App. 166-169). Respondents' appeal from that order was consolidated with their appeal from the Tax Court decision (C.A. App. 135).

the Maryland Revenue District mailed the notice of deficiency to respondents at their old address), did not allow sufficient time for the Service to process the 1987 return and update its computer database (*id.* at 12a-13a). See note 4, *supra*.

The court concluded that the Service "satisfied [its] statutory requirement under the Code" when it mailed the "notice of deficiency to the last known address" reflected in the IRS files at the time the notice was sent (App., *infra*, 13a). Since the notice was valid, the Tax Court petition was untimely under 26 U.S.C. 6213(a).

4. The court of appeals reversed (App., *infra*, 1a-11a). The court did not disturb the factual conclusion of the Tax Court that, at the time the notice of deficiency was mailed, respondents' "old" address was the "last known address" reflected in the Service's files. In particular, the court did not overturn the Tax Court's conclusion that the "new" address shown on the 1987 return was not received in sufficient "time for the Service to have posted that new address" (*id.* at 13a). See *id.* at 9a.[7]

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[7] The court of appeals did "not reach the question * * * of how much time, if any, the IRS should have to put a change of address on a computer" (App., *infra*, 9a). In view of the millions of returns that are received for processing annually, however, it has consistently been held, as "a practical operational necessity," that the Service be allowed "a reasonable time for processing" before new information is attributed to the agency in issuing notices of deficiency. *Williams* v. *Commissioner*, 935 F.2d 1066, 1068 (9th Cir. 1991). See also *Pomeroy* v. *United States*, 864 F.2d 1191, 1194 (5th Cir. 1989). For example, in *Williams* v. *Commissioner*, the court concluded that a notice of deficiency was not invalid even though it was mailed to the address shown in the agency's files *60 days after* the taxpayer filed a return containing "new" address information, because the "new" return information

Instead, the court held that the notice of deficiency was invalid for two separate reasons, either of which, according to the court, "would support our holding" (App., *infra*, 8a). The court first stated that, since the notice was "not delivered to the taxpayers because of an error of the Postal Service," "that is sufficient proof on the part of the taxpayers that the notice was insufficient" (*id.* at 7a). The court further held that "the IRS did not exercise reasonable diligence to ascertain [respondents'] last known address" because, "when the IRS received the return notice, that was proof that the same had not been delivered" (*ibid.*).[8] Concluding that "the ultimate non-delivery of the notice * * * was either the fault of the Postal Service

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had not been processed and incorporated into the Service's computer files. *Ibid.*

The Internal Revenue Service has recently promulgated guidelines for the processing time required for new addresses. Rev. Proc. 90-18, 1990-1 C.B. 491. The Revenue Procedure defines a taxpayer's "last known address" as the address shown on the most recently filed and processed return. Due to the high volume of returns received during filing season, the Revenue Procedure provides that a return received after February 14 will be deemed "processed" either on July 16 or 45 days after the return is received, whichever occurs later. A taxpayer who wishes to effect an address change sooner than this may do so by sending the Internal Revenue Service a notice on Form 8822 (Change of Address) apart from his tax return. If this is done, the new address will be posted within 45 days regardless of whether it is received within the peak filing period.

[8] In making this statement, the court of appeals ignored the Tax Court's finding that there is "nothing in the record" indicating that the Service "either received back the notice of deficiency, or had any other information upon which they could proceed to issue a new notice of deficiency" (App., *infra*, 13a).

Department or the IRS, or both," the court held that "the notice was insufficient" (*ibid.*).

Based upon its conclusion that the notice was insufficient, the court of appeals held that the Tax Court proceeding was timely under 26 U.S.C. 6213(a), for it was commenced within 90 days after respondents received "actual notice of the deficiency" (App., *infra*, 10a).[9] The court declined to address respondents' ultimate claim that, if the notice of deficiency is invalid, "the three-year statute of limitations found in 26 U.S.C. § 6501(a) bars future action against them concerning their 1984 tax return" (App., *infra*, 10a). The case was instead remanded to the Tax Court for it to make that determination "in the first instance" (*ibid.*).[10]

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[9] On respondents' appeal from the district court's order (see note 6, *supra*), the court of appeals remanded with instructions to dismiss that case as moot.

[10] Despite the remand order, there is no doubt that the statute of limitations on the making of an assessment for respondents' 1984 taxes has expired *if* the notice of deficiency at issue in this case is ineffective. If the notice is invalid, the Service is now barred from making any assessment of the 1984 taxes under 26 U.S.C. 6501(a) (assessments to be issued within three years of the filing of the return). By contrast, if (as we contend) the notice of deficiency is valid, although respondents would be barred from obtaining review of the 1984 tax assessment in the Tax Court, they would be entitled to contest the merits of that assessment by paying the taxes in dispute, seeking an administrative refund (26 U.S.C. 6511(a)) and then commencing a refund suit in either federal district court or the Claims Court (28 U.S.C. 1346(a)(1)).

REASONS FOR GRANTING THE PETITION

Each of the two, separate propositions adopted by the court of appeals creates a conflict among the circuits on an issue of substantial administrative importance. The court's holding that a notice of deficiency is invalid under Section 6212 of the Internal Revenue Code when, due to Postal Service error, it is not delivered (App., *infra*, 7a) conflicts with numerous decisions holding that "a notice mailed to the last known address is sufficient even if it is never received" (*King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988)). See, *e.g.*, *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). The court's further holding that, when a notice of deficiency is sent to the taxpayer's "last known address" but is returned unclaimed, the IRS has a duty of "diligence" to investigate and attempt redelivery (App., *infra*, 7a) directly conflicts with decisions holding that, when a notice is returned undelivered, the Service is not required "to find some other means of giving notice or sending certified letters until [it] is sure the taxpayer has been notified" (*Brown* v. *Lethert*, 360 F.2d 560, 561 (8th Cir. 1966)). See, *e.g.*, *Williams* v. *Commissioner*, 935 F.2d 1066, 1067-1068 (9th Cir. 1991); *Pomeroy* v. *United States*, 864 F.2d 1191, 1193-1195 (5th Cir. 1989).

The conflicts created by the decision in this case have substantial, recurring administrative importance. By invalidating notices of deficiency that have been mailed to the "last known address" reflected in the Service's records at the time the notice was issued, the decision overrides the clear language of the statute and seriously impedes the ability of the United States to collect taxes from the vast numbers of taxpayers who change their places of residence.

1. Section 6212 of the Internal Revenue Code authorizes the Internal Revenue Service to send a notice of tax deficiency to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). Once the notice "is mailed," the taxpayer has 90 days to seek review of the claimed deficiency in the Tax Court. 26 U.S.C. 6213(a). To provide a uniform and predictable method for issuing these notices, Congress specified in Section 6212 that the notice, "if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)).

Prior to the decision in this case, the courts of appeals had consistently held that the question whether the taxpayer actually received a properly mailed notice of deficiency is not relevant. Applying the plain language of the statute, the courts held that a notice of deficiency "mailed to the taxpayer's last known address" by certified or registered mail is "sufficient" (26 U.S.C. 6212(b)), whether or not it is actually received by the taxpayer.[11] See *Keado* v.

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[11] Indeed, a proposal that would have required the Service to establish actual receipt of the notice of deficiency was explicitly considered and rejected by Congress, because of the severe administrative burdens such a rule would impose. Sections 6212 and 6213 of the Code have their genesis in the Revenue Act of 1924, ch. 234, § 274, 43 Stat. 297. As reported out on the House floor, the bill required the Internal Revenue Service to send notice of a deficiency by registered mail, and permitted the taxpayer to file a petition with the Board of Tax Appeals within 30 days after the notice "is mailed" (65 Cong. Rec. 2969 (1924)). An amendment to this provision was offered under which the statutory period would have run from the date the notice of deficiency was "received" by the taxpayer." *Ibid.* This proposal was withdrawn in response to the objection that "there is much danger in compelling the department to prove the actual receipt by the addressee" (*id.* at 2970).

United States, 853 F.2d at 1211-1212 & n.9; *Rappaport* v. *United States*, 583 F.2d at 301; *Wilson* v. *Commissioner*, 564 F.2d 1317, 1319 (9th Cir. 1977), cert. denied, 439 U.S. 832 (1978); *Brown* v. *Lethert*, 360 F.2d at 562.[12] As the Ninth Circuit stated in *Cohen* v. *United States*, 297 F.2d 760, 772, cert. denied, 369 U.S. 865 (1962):

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[12] The court of appeals sought to rely (App., *infra*, 6a-7a) on *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981), for the proposition that non-delivery resulting from Postal Service error invalidates a notice of deficiency. In *McPartlin*, the Service had *not* sent the notice to the taxpayer's current address *as reflected in the Service's own records*. See *id.* at 1187, 1190. Moreover, due to an ongoing criminal investigation, the Service had specific knowledge of the taxpayer's change of address. See *id.* at 1187, 1191. These facts were sufficient to establish that the notice was not "mailed to the taxpayer at his last known address," and therefore was not "sufficient" under the statute (26 U.S.C. 6212(b)(1)). See 653 F.2d at 1190-1192. Although there was nothing in the Service's files to reflect that the letter had not been received by the taxpayer or was returned undelivered, the court concluded that the absence of a return receipt was unimportant because it may have resulted either from Postal Service error or from mishandling of the receipt by the IRS. *Id.* at 1191. The court stated, in dicta, that, if the Postal Service mishandled the return, or if the IRS knew that the notice was not delivered, that would provide further indication that the notice was "insufficient." *Ibid.* See *Keado* v. *United States*, 853 F.2d at 1212 n.9 (this aspect of the *McPartlin* decision is "dicta"). In expressing that view, however, the *McPartlin* court did not address or consider its prior holding in *Rappaport* v. *United States*, 583 F.2d at 301, that the statute "is satisfied by mailing notice to taxpayer's last known address whether or not actual notice is ever received" (*ibid.*, citing, *e.g.*, *Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962)).

> [T]he Congress, when it "authorized" service by registered [or certified] mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt.

The statute thus provides a method of notification that ensures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them; it does not impose upon the Internal Revenue Service the "almost impossible task of *proving* actual notice to the taxpayer." *Boren* v. *Riddell*, 241 F.2d 670, 672 (9th Cir. 1957).

This practical balancing of interests under the statute reflects the respective risks involved: (i) if the taxpayer does not receive the mailed notice, although he may be time-barred from protesting the deficiency in the Tax Court, he may still contest his liability by paying the tax and bringing a refund suit in federal district court or the Claims Court (see note 10, *supra*); (ii) if the notice of deficiency is invalid, however, any assessment based upon the notice is unenforceable (26 U.S.C. 6213(a)) and the taxes ordinarily are therefore uncollectible (26 U.S.C. 6501(a) (assessment must be made within three years of the return)).[13]

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[13] The facts of this case—and the taxpayers' claim that the statute of limitations has expired for making a new assessment of their 1984 taxes (see App., *infra*, 12a)—are typical. Due to the time required to process and determine deficiencies, it is common for notices of deficiency to be issued near the end of the applicable statute of limitations period. The taxpayers, moreover, are not required to take immediate action to challenge the sufficiency of the notice. When the taxpayers ultimately challenge the notice, it is ordinarily too late for the Service to issue further notices or to reassess the taxes at issue.

In holding that a notice of deficiency is "insufficient" if it is not received by the taxpayer due to "an error of the Postal Service" (App., *infra*, 7a), the decision in this case squarely conflicts with this established line of precedent in other circuits.[14] The court's holding also disregards the applicable statutory text, which straightforwardly provides that a notice "mailed to the taxpayer at his last known address" is "sufficient" (26 U.S.C. 6212(b)(1)). As the Tenth Circuit recently observed in *Scheidt* v. *Commissioner*, 967 F.2d 1448, 1451 (1992):

> Section 6213(a) clearly provides for a tolling of the limitations period when the Commissioner *mails* the deficiency notice. Absent any evidence of Congressional intent, we decline to graft an additional prerequisite to the tolling of the limitations period based on whether a taxpayer *re-*

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[14] Indeed, the decision in this case conflicts with prior Fourth Circuit precedent as well. In *Luhring* v. *Glotzbach*, 304 F.2d 556 (1962), the court held that a properly mailed notice is "valid even though it was not actually received by the taxpayers." *Id.* at 558. The court added:

> The statute * * * does not require service of actual notice upon the taxpayer but merely the mailing of the notice to him by certified or registered mail at his last known address. Obviously this procedure is designed to take care of the continual movement of taxpayers throughout the country in following their pursuits, and it gives warning to them of the risk they take if they change the residence or place of business shown on the return without notifying the tax officials in the place where the return has been filed.

Id. at 558-559. The Fourth Circuit has never overruled *Luhring* and did not discuss it in its decision in this case (or in its order denying rehearing and our en banc suggestion).

> *ceives* the notice of deficiency in the due course of the mails.

In holding that a notice of deficiency is not valid if it has not been received due to Postal Service error (App., *infra*, 7a), the court of appeals reached precisely the opposite conclusion in this case.[15]

2. The second major holding of the court of appeals also represents a radical departure from precedent. The court held that, under Section 6212, the Internal Revenue Service has a duty of "diligence" to investigate and attempt redelivery when a notice of deficiency that is sent to the taxpayer's "last known address" is thereafter returned undelivered (App., *infra*, 7a). That requirement, of course, is flatly contradicted by the language of the statute, which provides that a notice "mailed" to the "last known address" is "sufficient" (26 U.S.C. 6212(b)(1)). It also conflicts with numerous decisions of other courts of appeals that have rejected the very argument adopted by the court in this case.

For example, in *Pomeroy* v. *United States*, the Fifth Circuit held that a notice of deficiency mailed to the address reflected on the latest return in "the IRS computer file" is "sufficient" under the statute, even though the notice was returned undelivered and no further attempt at delivery was made. 864 F.2d at 1194-1195. The court held that information subsequently acquired could not affect the validity of the notice, because the inquiry under the statute focuses

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[15] The requirement in this case that the Service establish actual receipt of the notice of deficiency raises precisely the danger that Congress recognized and sought to avoid in enacting the provisions now codified in Sections 6212 and 6213 of the Code. See note 11, *supra*.

"on the information available to the IRS *at the time it issued the notice of deficiency.*" *Id.* at 1195 (quoting *Mulder* v. *Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988)).[16] The same conclusion was reached in *Williams* v. *Commissioner*, 935 F.2d at 1067-1068, and in *Brown* v. *Lethert*, 360 F.2d at 561. As the Ninth Circuit stated in *King* v. *Commissioner*, 857 F.2d at 681, "[n]othing in the statute suggests that the IRS is obligated to take additional steps to effectuate delivery if the notice is returned; indeed, a notice mailed to the last known address is sufficient even if it is never received."

The only requirement imposed by the statute is that the notice of deficiency be mailed by certified or registered mail to the taxpayer's "last known address." In making this determination, "[t]he focus is on the information available to the IRS at the time

[16] The court of appeals erred in this case in concluding (App., *infra*, 5a-6a) that the opinion of the Fifth Circuit in *Mulder* v. *Commissioner* supports its decision. In *Mulder*, the court emphasized that the taxpayer's "last known address" under Section 6212 is to be determined from "the information available to the IRS at the time it issued the notice of deficiency." 855 F.2d at 211. In that case, the Service had twice sent letters to the taxpayer that had been returned undelivered *before* it issued the notice of deficiency to the same address. *Id.* at 211-212. The court held, in that context, that, before the notice of deficiency was issued, the Service should have contacted the tax return preparer—whose name and address were shown on the taxpayer's return (*id.* at 210)—to determine the taxpayer's current address. *Id.* at 212. The *Mulder* court did *not* hold that information gained *after* the notice of deficiency is mailed is relevant in determining the sufficiency of the notice; indeed, the court stated quite clearly to the contrary that the sufficiency of the notice depends "on the information available to the IRS at the time it issued the notice of deficiency." *Id.* at 211.

it issued the notice of deficiency" (*Mulder* v. *Commissioner*, 855 F.2d at 211), *not* on whether the notice was sent to "the taxpayer's most current address" (*Alta Sierra Vista, Inc.* v. *Commissioner*, 62 T.C. 367, 374 (1974), aff'd, 538 F.2d 334 (9th Cir. 1976) (Table)) or on information acquired by the Service *after* the notice is issued.

3. The Service is not equipped to track down current addresses for millions of delinquent taxpayers each year. The statute, moreover, expressly negates any such requirement, for it specifies that the notice is to be mailed to the taxpayer's last "known" address (26 U.S.C. 6212(b)), not to any other location.[17] By imposing unmanageable detective burdens on the Service, and by threatening the Service's ability to assess and collect taxes from the millions of taxpayers who change their places of residence, the decision in this case creates conflicts among the circuits on a matter of extraordinary administrative importance.

The Internal Revenue Service advises us that it issues more than 2,000,000 notices of deficiency each year and that approximately 240,000 of those notices were returned undelivered during the past year. Indeed, the Postal Service each year returns more than eight million pieces of mail of all types to the Internal Revenue Service as undeliverable. By requiring the Service to undertake additional investigations each time a notice is returned in an effort to avoid the loss of revenue, the decision in this case threatens to

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[17] A requirement that the Service give consideration to information acquired *after* a notice of deficiency is returned undelivered would often produce absurd results. For example, if (as in this case) the Service is first informed of nondelivery after the statute of limitations for assessment of taxes has expired, the result would be to bar collection of otherwise valid tax claims.

deluge the Service's tax collection procedures and "virtually paralyze" the Service's enforcement efforts (*Williams* v. *Commissioner*, 57 T.C.M. (CCH) 1357, 1359 (1989), aff'd, 935 F.2d 1066 (9th Cir. 1991)).

The decision in this case also threatens to create a "window of time" during which the Internal Revenue Service may be helpless to protect its rights in pursuing delinquent taxpayers. Under the court's decision, any deficiency notice that is not delivered due to Postal Service error, or that is mailed by the IRS after a taxpayer has changed his address, is subject to being invalidated. The IRS, of course, cannot know when "Postal Service error" is occurring; nor can it know when subsequent information will reflect a more recent address for the taxpayer. If notices of deficiency are invalidated for these reasons, the time for issuing new notices and tax assessments will often, if not ordinarily, have expired. See notes 10, 13, *supra*. By jeopardizing the normal collection of revenues from the hundreds of thousands of delinquent taxpayers each year who change their places of residence, the decision in this case thwarts the statutory scheme for the assessment and collection of taxes and threatens significant injury to the public fisc.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-1489

CLAYTON J. POWELL; DARLENE W. POWELL,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Appeal from the United States Tax Court
Peter J. Panuthos, Special Trial Judge
(Tax Ct. No. 89-740)

No. 89-1494

CLAYTON J. POWELL; DARLENE W. POWELL,
PLAINTIFFS-APPELLANTS

v.

INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Frederick N. Smalkin, District Judge
(CA-89-182-S)

Argued: April 8, 1991

Decided: March 3, 1992

Before RUSSELL and WIDENER, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WIDENER, Circuit Judge:

In these consolidated cases, Clayton J. Powell and Darlene W. Powell appeal from an order of the United States tax court dismissing their petition for lack of jurisdiction and from an order of the United States District Court for the District of Maryland denying their request for injunctive relief. While we remand to dismiss for mootness the case in the district court, we are of opinion that the tax court erred in dismissing the Powells' petition for lack of jurisdiction.

The events leading to the present controversy are traced back to late 1987, when the Powells moved from 10519 Carnation Court, Adelphi, Maryland, to 12051 Hallandale Terrace, Mitchellville, Maryland. The Powells' income tax return for calendar year 1986 contained the Carnation Court address and the Hallandale Terrace address first appeared on their 1987 return. The Internal Revenue Service (IRS) received the Powells' 1987 tax return more than two months early, on February 11, 1988, and posted the enclosed payment to their account.

Eighteen days later, on February 29, 1988, the IRS mailed a notice of deficiency with respect to the

Powell's joint tax return for 1984. This notice was sent by certified mail to the Powells' former address at Carnation Court. According to the evidence of the Hyattsville, Maryland Postmaster, the Powells had submitted a change of address order to the Postal Service. Nevertheless, the deficiency notice was, according to the Postmaster, mishandled by the Postal Service, endorsed "unclaimed," and returned to the IRS without being forwarded to the taxpayers. The IRS, in contrast, stated that there was nothing in the Powell's administrative file to indicate that the notice was returned to the IRS.

We especially note that the February 29th notice from the IRS to the Powells was sent by certified mail, and while the Postal Service should have forwarded the notice to the Powells, there is nothing to indicate that the post office made two mistakes and did not return the notice to the IRS. In any event, since we presume, as we must, that public officers have properly discharged their official duties, e.g., *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926), it is presumed, as the evidence from the Postmaster would indicate, that the notice was returned to the IRS, which then lost or misplaced it, for on argument in the tax court, the attorney for the Government stated that the notice was not in the Powells' administrative file where it should have been.

On December 26, 1988, the IRS mailed a final notice of its intention to levy unless the Powells paid $6,863.60 within ten days. This notice was sent to the Powells' correct address at Hallandale Terrace and was promptly received. On January 11, 1989, the Powells filed a petition in the United States tax court seeking a redetermination of the alleged deficiency. In response, the Commissioner filed a mo-

tion to dismiss, arguing that because the Powells' petition had not been filed within ninety days of the mailing of the original deficiency notice, the tax court had no jurisdiction. After conducting an evidentiary hearing on the motion, the tax court granted the respondent's motion to dismiss for lack of jurisdiction on the ground that the Powells' petition was untimely filed. This appeal followed.

Under 26 U.S.C. § 6212(b)(1), a notice of deficiency with respect to income tax is deemed "sufficient" if it is mailed to the taxpayer at his "last known address." The taxpayer then has a period of ninety days from the mailing of this deficiency notice in which to file a petition with the tax court seeking a redetermination of the deficiency. 26 U.S.C. § 6213(a). The central issue raised on this appeal is whether the Commissioner's February 29, 1988 mailing was properly directed to the Powells' last known address and thereby triggered the ninety-day period for the filing of a petition in the tax court.

The taxpayer's last known address has been defined as that which "in light of all relevant circumstances, the IRS reasonably may consider to be the address of the taxpayer at the time the notice of deficiency is mailed." *Mulder v. Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988). This inquiry "requires an examination of the totality of the circumstances and a balancing of many relevant factual elements, factors which indicate that the inquiry is 'essentially factual.'" *King v. Commissioner*, 857 F.2d 676, 679 (9th Cir. 1988). Thus, where a full evidentiary hearing is held, as in the present case, findings largely factual, on the last known address issue should be reviewed under a clearly erroneous standard. *Ward v. Commissioner*, 907 F.2d 517, 521 (5th Cir. 1990);

King, 857 F.2d at 679; *McPartlin v. Commissioner*, 653 F.2d 1185, 1189 (7th Cir. 1981).

For many years, the courts construed 26 U.S.C. § 6212(b)(1) as allowing the IRS to consider the address shown on the tax return for the year in question as the taxpayer's last known address. See, e.g., *Luhring v. Glotzback*, 304 F.2d 556, 559 (4th Cir. 1962). While this approach has been abandoned by many courts, it should be noted that even under the traditional approach, the IRS was not entitled to rely upon the address on the question return if "clear and concise" notice was given by the taxpayer of a change in address. *Alta Sierra Vista, Inc. v. Commisisoner*, 62 T.C. 367, 374 (1974), *aff'd*, 538 F.2d 334 (9th Cir. 1976). The taxpayer may give such clear and concise notice by filing a subsequent return bearing a new address. *King*, 857 F.2d at 679; *Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 664 (10th Cir. 1985). In such a situation, the address on the taxpayer's most recent return is deemed to be his last known address. *See United States v. Zolla*, 724 F.2d 808, 810 (9th Cir.), *cert. denied*, 469 U.S. 830 (1984).

The authorities further require that the Commissioner must use reasonable diligence to ascertain the last known address. *Ward*, 907 F.2d at 521; *McPartlin*, 653 F.2d at 1189; *Mulder*, 855 F.2d at 211; *Alta Sierra Vista, Inc.*, 62 T.C. at 374. In the case before us, despite the fact that the taxpayers had proven by the Postmaster that the notice of deficiency was returned to the IRS, the IRS called not a witness to refute the evidence of the Postmaster but merely relied upon the statement of its attorney that the returned notice of deficiency could not be found in the Powells' administrative file. Almost the same thing

happened to the IRS file in *Mulder*. "Moreover, the IRS file does not contain either the original letter or the executed return receipt." 855 F.2d at 211.* The *Mulder* court held that the return of mailings to the IRS was "a fact which weighs heavily in the due diligence equation." 855 F.2d at 211. And because there had been no return of the notice to the IRS in *Mulder* and the return receipt had been lost either by the post office or by the IRS, the court held that due diligence had not been used and there had been no sufficient notice of a deficiency served on the taxpayer.

McPartlin was another case in which the IRS mailed a deficiency notice to a previous address, although it had actual notice by way of later communications that the taxpayers had moved. The notice was sent to the previous address by certified mail with return receipt requested. As in *Mulder* and this case, the key documents in the case were missing from the IRS file. "Petitioners never received the notice mailed April 13, 1978, nor does the Commissioner's file on petitioners contain a return receipt for the notice." *McPartlin*, 653 F.2d at 1188. The court in *McPartlin* held the notice was insufficient for two reasons. First, a lack of due diligence on the part of the Commissioner, and, second, a notice of deficiency not received by the taxpayers due to an error of the Postal Service is insufficient. The court noted that the fact that the Commissioner's file contained no return receipt for the notice fostered a conclusion that fault for failure

---

* We note that if the IRS in the case at hand had acknowledged receiving the undelivered notice back from the Postal Service, it would have been proof positive that the same had not been delivered, and so the mailing would have necessarily been insufficient, absent further inquiry on the part of the IRS, which was never made.

to receive it was either with the Postal Service or the Commissioner and not, in any event, with the taxpayers. The court held that if the Commissioner had failed to receive a return receipt, that "should have apprised him that delivery to petitioners of the notice of deficiency was never attempted" and also that "if, on the other hand, the return receipt was sent to the Commissioner it should have informed him that petitioners no longer resided at . . . [their previous address]." The court held that "[i]n such circumstances notice is also insufficient." 653 F.2d at 1191. The previous and alternate holding was that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayers due to error of the Postal Service the notice shall be found insufficient." 653 F.2d at 1191.

In the case before us, the notice was admittedly not delivered to the taxpayers because of an error of the Postal Service. Consistent with *McPartlin*, we hold that that is sufficient proof on the part of the taxpayers and that the notice was insufficient. Also, consistent with *McPartlin* and *Mulder*, we are of opinion and hold that the IRS did not exercise reasonable diligence to ascertain the Powells' last known address. There is no reason to believe that the undelivered notice was not returned to the IRS as the Postmaster said it was. His statement to that effect is uncontradicted. That being true, when the IRS received the returned notice, that was proof that the same had not been delivered to the Powells. The IRS cannot rely on the fact that it lost or misplaced the notice for proof of its case against these taxpayers.

In arriving at our conclusion, we have also considered that the record in this case does not disclose whether the notice was sent to the Powells by certified

mail with return receipt or without return receipt. If it was sent with return receipt, the same rule applied by the Court in *McPartlin* would apply here, and the absence of it would show non-delivery. If it was sent without a request for return receipt, that would be evidence which would tend to show a lack of due diligence and would be additional evidence to support our conclusion.

The Powells are entirely innocent. When they moved, they filed their change of address forms with the Postal Service and the ultimate non-delivery of the notice to them was either the fault of the Postal Service Department or the IRS, or both. The evidence would indicate it was the fault of both, and we so hold. In these circumstances, we hold the notice was insufficient, although the fault of either department in the circumstances present here would support our holding.

The IRS argues against this conclusion by taking the position that the Carnation Court address to which it mailed the deficiency notice was the only address listed for the Powells on the IRS computer file, and, thus, although the IRS had actual notice of the Powells' change of address in its paper files by virtue of a later filed income tax return, it should not be held to this knowledge because the change of address would not yet show up on its computer. In effect, the IRS states that since the Powells' new address would not show up on its computer until June 6, 1988, some four months after it was received by the IRS, that it should not be held to the change of address on February 29, 1988. While there may be some justification for this argument, that computers are an accepted way of doing business, there would seem to be as many or more reasons for not accepting

it. For example, the IRS is arguing that the computer is a less efficient way of keeping track of addresses than the old way of simply looking in a file. The IRS urges that we accept what it calls a decision in *Ward* that it should have a reasonable time to process change of address notifications. While the court in *Ward* did state that it did "not disagree" with that proposition, it did not hold that it applied in that case, for the holding in *Ward* was that the IRS did have an opportunity to process the change of address so the court did not have to decide the question. In any event, in *Ward*, the taxpayer had written to the IRS on November 6th, notifying him of his new address. That letter was received by the IRS on November 10th; and on November 18th, the IRS wrote a letter to the taxpayer, thanking him for filing his change of address. Nevertheless, on November 20th the IRS mailed a notice of deficiency to the taxpayer at his old address, which was held by the *Ward* court to be insufficient. We do not reach the question here of how much time, if any, the IRS should have to put a change of address on a computer. We do suggest, however, that the *Ward* court would have had to strain a lot to find a sufficient notice when the IRS had acknowledged the change of address in writing. Also, as *McPartlin* rather forcibly points out, if the IRS had simply kept the Powells' file in order and mailed the notice by certified mail, with return receipt requested, it would have had no trouble in finding the Powells' address.

The tax court did not give any effect to the uncontradicted evidence of the Postmaster that the undelivered notice had been returned to the IRS. The tax court also did not consider the question of the due diligence required of the IRS. For these rea-

sons, its decision that the deficiency notice mailed to the Powells on February 29, 1988 was sufficient within the meaning of section 6612(b)(1) is clearly erroneous. We are of opinion that it was not sufficient, and we so hold for the reasons stated above.

We further find that the Powells' petition for redetermination was timely filed before the tax court. When notice of a deficiency is not sent to a taxpayer's last known address, subsequent actual notice of the deficiency will commence the running of the ninety-day period. *McPartlin*, 653 F.2d at 1192; *Crum v. Commissioner*, 635 F.2d 895, 901 (D.C. Cir. 1980). In this case, the Powells received actual notice no earlier than December 1988 when they received the final notice of the IRS's intention to levy. Their petition was filed on January 11, 1989, well within the ninety-day period.

The Powells also contend that the three-year statute of limitations found in 26 U.S.C. § 6501(a) bars future action against them concerning their 1984 tax return. The order of the tax court understandably did not reach this question because of its conclusion that it was without jurisdiction to consider the petition. We believe that a determination concerning the application of the statute of limitations to the facts of this case should be made in the first instance by the tax court, and we do not reach that question.

We accordingly reverse the order of the tax court granting the Commissioner's motion to dismiss and remand the case to the tax court for additional proceedings consistent with this opinion.

Finally, the Powells argue that the district court abused its discretion in refusing to grant their request for injunctive relief pursuant to 26 U.S.C. § 6213(a). The record reveals that the district court

never considered on its merits the request for injunctive relief; rather, it declined to hear the same. While we might arguably consider such a refusal as a denial of injunctive relief, we think that is not necessary, for in this case, there has literally been neither a granting nor a denial of injunctive relief. In any event, because of the relief we have granted in the appeal from the judgment of the tax court, it is apparent that the suit in the district court requesting an injunction is moot. Accordingly, that case will be remanded for dismissal as moot.

Case No. 89-1489 is

REVERSED AND REMANDED WITH INSTRUCTIONS.

Case No. 89-1494 is remanded to the district court for dismissal as moot.

REMANDED WITH INSTRUCTIONS

APPENDIX B

[A. 130-132]

* * * * *

THE COURT: Okay. If there's nothing further from the parties, the Court is prepared to rule on Respondent's motion.

The situation here is that there's no question that the petition is untimely, so the Court must dismiss this case. The Court cannot take jurisdiction. The only question then is whether or not the dismissal is against Respondent for having issued an invalid notice of deficiency, or against Petitioner for filing an untimely petition in response to a valid notice of deficiency.

The Respondent's statutory obligation is to issue a notice of deficiency to the taxpayer's last known address. There are many, many, many cases defining what "last known address" is.

The situation and facts and record here reflect that the most recent return which had been processed by the Internal [131] Revenue Service was the 1987 return, but that return was filed on approximately February 11, 1988, and according to the testimony was not actually processed until sometime later.

On February 29th, 1988, a notice of deficiency was issued to Petitioners at 10519 Carnation Court, Adelphia, Maryland, 20783. That's the address shown on the 1986 return.

There is ample support in cases which hold that the Service should be allowed a reasonable period of time in order to process a Federal tax return and process a change of address. Here, the lapse of time between receipt of the '88 return, showing a new address, on February 11th, 1988, and the issuance of the notice of deficiency on February 29th, 1988,

would appear to be an insufficient time for the Service to have posted that new address.

The question before the Court is not whether or not Petitioner received the notice of deficiency. Respondent has satisfied his statutory requirement under the Code by simply mailing a notice of deficiency to the last known address. We're satisfied Respondent did that.

Additionally, cases cited by Petitioner that Respondent could have done something more to check on a further address may be relevant in a situation where Respondent receives information that, in fact, the notice of deficiency was not received by Petitioner, or that Respondent might have erroneously issued a notice of deficiency. There's nothing in [132] the record here indicating Respondent either received back the notice of deficiency, or had any other information upon which they could proceed to issue a new notice of deficiency, or even forward the notice of deficiency that had been issued.

With respect to Petitioners' arguments concerning equity, the Petitioners have a reasonable equitable argument, and if this were a court that could exercise those kinds of equitable powers, the Court might well say, you know, "Under these circumstances, you didn't receive the notice." In fairness to Petitioners, I would say, "Let's hear this case on the merits, in any event." But this is a court of limited jurisdiction. The Court's jurisdiction is defined by the statute, So I can't expand that jurisdiction.

There is no question that it was an untimely petition. The Court can't do anything to consider the merits of the case.

Under all of these circumstances, the Court will grant the Respondent's motion to dismiss for lack of jurisdiction.

The Court will recess.

[Whereupon, at 3:00 p.m., the hearing adjourned.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1489

CLAYTON J. POWELL; DARLENE W. POWELL,
PETITIONERS

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

No. 89-1494

CLAYTON J. POWELL; DARLENE W. POWELL,
PLAINTIFFS-APPELLANTS

versus

INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

FILED: May 13, 1992

ORDER

There having been no request for a poll of the court, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrence of Judge Williams. Judge Russell dissents.

/s/ H. E. Widener, Jr.
For the Court

APPENDIX D

1. Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212, provides in pertinent part:

NOTICE OF DEFICIENCY

(a) **In General.**—If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) **Address for Notice of Deficiency.—**

(1) **Income and gift taxes and certain excise taxes.**—In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 42, chapter 43, chapter 44, or chapter 45 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 42, chapter 43, chapter 44, chapter 45 and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

2. Section 6213 of the Internal Revenue Code, 26 U.S.C. 6213, provides in pertinent part:

RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT

(a) **Time for Filing Petition and Restriction on Assessment.**—Within 90 days, or 150 days if the

notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44 or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessments or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(c) **Failure to File Petition.**—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

* * * * *

3. Section 6503 of the Internal Revenue Code, 26 U.S.C. 6503, provides in pertinent part:

SUSPENSION OF RUNNING OF PERIOD OF LIMITATION

(a) **Issuance of Statutory Notice of Deficiency.—**

(1) **General rule.**—The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

* * * * *

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 6 1992
OFFICE OF THE CLERK

(2)

No. 92-452

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

CLAYTON J. POWELL, JR., *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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October 6, 1992

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service may seek to collect additional taxes from taxpayers after the parties have agreed to settle their dispute and the compromise has been paid?

2. Whether the Government complied with Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212, which requires that a notice of deficiency be mailed to the taxpayers' last known address, where the Internal Revenue Service has failed to direct the notice to the address appearing on the taxpayers' most recent tax return and the Postal Service has failed to forward the notice to the taxpayers' correct address?

3. Whether it is constitutionally permissible for the Internal Revenue Service to take the property of innocent taxpayers to satisfy a disputed assessment before they can challenge the action, where the taxpayers' inability to protest the alleged deficiency is brought about solely by the Government's failure to give them proper notice thereof?

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No. 92-452

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

CLAYTON J. POWELL, JR., *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Clayton J. Powell, Jr., and Darlene Wright Powell, the innocent taxpayers in this case (hereinafter referred to as the "Respondents" or the "taxpayers"), urge this Honorable Court, for the reasons set forth herein, to deny issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment in *Powell v. Commissioner,* 958 F.2d 53 (1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Fifth Amendment of the United States Constitution, and sections 6212, 6213, 6501 and 7122 of the Internal Revenue Code, 26 U.S.C. 6212, 6213, 6501 and 7122, are set forth in the Appendix (App., *infra*, 1a-5a).

STATEMENT OF THE CASE

Background.

In March of 1985, the Respondents filed a joint income tax return with the Internal Revenue Service (hereinafter sometimes referred to as the "agency" or the "IRS") for calendar year 1984. Subsequently, the taxpayers were subjected to a comprehensive and lengthy audit procedure which, after prolonged discussions with an IRS agent, resulted in a Four Hundred Seventy-Two Dollar and Sixty-Nine Cents ($472.69) increase in the taxpayers' income tax liability for the 1984 tax year. (C.A. App. 42.)[1] The Respondents' final settlement with the IRS was based on a certain revised examination report. (C.A. App. 44.) On July 3, 1986, the Respondents paid the IRS the agreed upon sum in full satisfaction of the income tax obligations purported to be due for 1984.

On or around February 7, 1988, the Respondents mailed their 1987 tax return to the IRS, where it was received on February 11, 1988. (C.A. App. 75.) The 1987 return disclosed the Respondents' address as "12051 Hallandale Terrace, Mitchellville, Maryland

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

20716." There was no further communication between the parties with respect to this matter until August of 1988, when the Respondents received a "Statement of Tax Due on Federal Tax Return." (C.A. App. 54.) To clear up what appeared to be a clerical mistake, the taxpayers, on September 12, 1988, sent a letter to the tax auditor who had reviewed their 1984 tax return and sent a copy of the correspondence to the IRS service center in Philadelphia. (C.A. App. 55.) The IRS never responded.

Unbeknownst to the taxpayers, the IRS had attempted to send them a statutory notice of deficienty on February 29, 1988. Postal Service Form 3877 (C.A. App. 59.) indicates that the letter was directed to "10519 Caration Court, Adelphi, Maryland 20783" [sic] and was marked as article number "22454". Unfortunately, however, the taxpayers, never received this item due entirely to errors committed by the IRS and the United States Postal Service (hereinafter collectively referred to as the "Government").

The Respondents had moved from 10519 Carnation Court in Adelphi, Maryland to 12051 Hallandale Terrace in Mitchellville, Maryland sometime during the latter part of 1987. The United States Postal Service had been advised of their change of address, but failed to forward article 22454 to the taxpayers at their new location, as evidenced by the Affidavit of Roger Keith Ballard, Manager of the Mitchellville - South Bowie Post Office (the post office serving Hallandale Terrace) (C.A. App. 60.) dated May 18, 1989, and a letter from Martin Joyce, Postmaster of the Hyattsville Post Office (the post office serving Carnation Court) dated May 31, 1989. (C.A. App. 63.) The Respondents' formal change of address is undisputed.

On Friday, January 6, 1989 – almost *four* (4) years after filing their 1984 tax return – the Respondents received a document from the IRS entitled "FINAL NOTICE (NOTICE OF INTENTION TO LEVY)," (hereinafter referred to as the "Final Notice") (C.A. App. 56.), whereby the IRS threatened to immediately levy on the taxpayers' property.[2] The Final Notice demanded Six Thousand Six Hundred Seventy-Eight Dollars and Twenty-Eight Cents ($6,678.28) in prior assessments, Eighty-Six Dollars and Twenty-Six Cents ($86.26) in late penalties and Ninety-Nine Dollars and Six Cents ($99.06) in interest.[3]

Course of the Proceedings Below.

In order to protect themselves against a wrongful assessment by the IRS, the taxpayers filed a petition with the United States Tax Court.[4] Mr. Powell also sent another letter to the IRS reminding the agency that the "dispute concerning my 1984 tax return was settled in July of 1986." (C.A. App. 58.) Once again, the IRS failed to respond.

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[2]The taxpayers did not actually receive a copy of the statutory notice of assessment for 1984 until sometime in 1989 during informal discovery during the Tax Court proceedings – more than a year after the three-year statute of limitations had run.

[3]As of June 29, 1992, the total amount being claimed by the IRS had increased to $10,544.70.

[4]The taxpayers also filed a complaint for preliminary, interlocutory and permanent injunctive relief with the United States District Court for the District of Maryland. See, C.A. App. 192-207. On appeal, the Fourth Circuit remanded to the district court with instructions to dismiss the case as moot.

Disposition of the Courts Below.

After a brief hearing on the Commissioner's motion to dismiss, the United States Tax Court found that the IRS had sent a proper notice of deficiency to the taxpayers at their "last known address" on February 29, 1988, and dismissed the Respondents' petition for redetermination of a tax deficiency for lack of jurisdiction on the ground that the taxpayers had not filed their petition within 90 days after issuance of the statutory notice.

The taxpayers appealed and on March 3, 1992, the Court of Appeals for the Fourth Circuit entered its opinion reversing the decision of the United States Tax Court, saying, in pertinent part:

> The Powells are entirely innocent. When they moved, they filed their change of address forms with the Postal Service and the non-delivery of the notice to them was either the fault of the Postal Service Department or the IRS, or both. The evidence would indicate it was the fault of both, and we so hold.

The Commissioner's petition for rehearing with suggestion for rehearing en banc was denied on May 13, 1992. The Commissioner now seeks a writ of certiorari from this Honorable Court. The Respondents oppose the issuance of the requested writ for the reasons set forth herein.

SUMMARY OF ARGUMENT

The Tax Court was in error when it dismissed the taxpayers' petition for redetermination of a tax deficiency for lack of jurisdiction on the ground that the Respondents in this case did not file their petition within ninety days after issuance of a statutory notice of deficiency.

The Government failed and refused to send a statutory notice to the taxpayers at 12051 Hallandale Terrace, Mitchellville, Maryland 20716, their last known address, which was provided to the Internal Revenue Service on the taxpayers' 1987 tax return which the IRS received on February 11, 1988. Furthermore, the claim being asserted by the Commissioner was compromised in 1986 and the alleged deficiency was not assessed before expiration of the three-year statute of limitations. Under circumstances such as these, the taxpayers would be denied due process of law if their property is taken before they can challenge the illegal and disputed assessment.

The United States Court of Appeals for the Fourth Circuit decided this case in accordance with well-settled legal principles. Therefore, it is not necessary for this Honorable Court to review this case to consider the frivolous issues pressed by the Commissioner.

ARGUMENT

I.

THE INTERNAL REVENUE SERVICE SHOULD BE BOUND BY THE SETTLEMENT IT ENTERED INTO IN 1986.

The tax controversy in this case should have been laid to rest on July 3, 1986, when the parties entered into a final settlement in accordance with the Internal Revenue Code.[5] As pointed out by the United States District Court for the District of South Carolina in *Cooper Agency v. United States*, 301 F. Supp. 871 (1969):[6]

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[5] 26 U.S.C. Section 7122.

[6] *Affirmed*, 422 F.2d 1331, *certiorari denied*, 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141.

> It is well-settled that a compromise settlement of tax liabilities . . . is a contract, governed by the rules applicable to contracts generally . . .

In the instant case, the IRS audited the taxpayers for tax year 1984, then in June of 1986 sent them a Report of Individual Income Tax Examination Changes (C.A. App. 44.) promising that "you may consider it as your notice that your case is closed . . ." Now, more than six years later, this case is still open. Based on the rule in *Cooper Agency, supra,* the settlement agreement in this case should be enforced such that the claim of the Internal Revenue Service is barred by the doctrine of accord and satisfaction. The denial of a writ of certiorari will promote the proper administration of justice.

II.

THE GOVERNMENT FAILED TO SEND A STATUTORY NOTICE TO THE TAXPAYERS AT THEIR "LAST KNOWN ADDRESS."

The Commissioner mischaracterizes the notice issue in this case. The question is not whether the taxpayers received statutory notice. The real issue is whether the Government complied with Section 6212 of the Internal Revenue Code.

To support his position, the Commissioner argues that the court of appeals decision in this case conflicts with *King v. Commissioner,* 857 F.2d 676 (9th Cir. 1988). But this is not true. In *King, supra,* the Ninth Circuit held that "the taxpayer's 'last known address' is the address on his/her most recent return . . . a notice of deficiency mailed to that address will be sufficient . . ." The Commissioner's reliance upon *Keado v. United States,* 853 F.2d 1209 (5th Cir. 1988) is also misplaced because the taxpayers actually received a viable notice. In *Rappaport v. United States,* 583 F.2d 298 (1978),

the complaining taxpayer was an embezzler who did not receive the notice of deficiency that "was mailed to the most current address available in the [Internal Revenue] Service's files because he had assumed a different name and moved to Chicago without leaving a forwarding address."

Nor can the Commissioner rely upon the decisions in *Brown v. Lethert,* 360 F.2d 560 (8th Cir. 1966), *Williams v. Commissioner,* 935 F.2d 1066 (9th Cir. 1991) or *Pomeroy v. United States,* 864 F.2d 1191 (5th Cir. 1989). In *Brown, supra,* the IRS sent a notice of deficiency to the taxpayer at his proper address by certified mail. In *Williams, supra,* the Ninth Circuit allowed the IRS reasonable time in which to process change of address information only where "notification to the post office by the taxpayer to forward mail to the taxpayer's new address would avoid notification problems." *Pomeroy, supra,* stands for the proposition that the Internal Revenue Service may rely upon the taxpayer's most recently filed return as his "last known address." Moreover, the Fourth Circuit's decision in this case, contrary to the assertions of the Commissioner, is in line with the opinion in *Luhring v. Glotzbach,* 304 F.2d 556 (4th Cir. 1962). Thus, the decision rendered by the court of appeals below is not in conflict with established law. A more detailed analysis is set forth below:

A. The Internal Revenue Service did not send a statutory notice to the taxpayers at their "last known address."

Section 6212(b) of the Internal Revenue Code[7] requires the IRS to mail a notice of deficiency to a taxpayer's "last known address" at least ninety (90) days

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[7] 26 U.S.C. Section 6212(b).

before assessing a tax deficiency. In the instant case, this was not done.

Before it can be determined whether the statutory notice was mailed to the taxpayers' "last known address," one must first define the term "last known address." Until recently, the term was not defined in either the statutes or the regulations.[8] The definition must therefore be extracted from a vast assortment of case law.

In *Alta Sierra Vista, Inc. v. Commissioner,* 62 T.C. 367, 374 (1974), *aff'd mem.,* 528 F.2d 334 (9th Cir. 1976), the Tax Court defined "last known address" as "the taxpayer's last permanent address of a definite duration to which the taxpayer has directed the Commissioner to send all communications."

The term has also been defined as "that address to which the IRS reasonably believes the taxpayer wishes the notice sent." *United States v. Ahrens,* 530 F.2d 781, 785 (8th Cir. 1976); *Sorrentino v. Ross,* 425 F.2d 213, 215 (5th Cir. 1970); *Delman v. Commissioner of Internal Revenue,* 384 F.2d 929, 932 (3d Cir. 1967), *cert. denied,* 390 U.S. 952, 88 S.Ct. 1044, 19 L.Ed.2d 1144 (1968).

In recognition of the administrative difficulties associated with changes of address, the courts have required taxpayers to provide "clear and concise" notice of any address change. See, *Alta Sierra, supra.* And it is now well recognized that a taxpayer's subsequent return bearing a new address provides the IRS with "clear and concise" notice. See, *Cyclone Drilling, supra;. United States v. Zolla,* 724 F.2d 808, 810 (9th Cir. 1984),

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[8] During the pendency of this litigation, the IRS promulgated Rev. Proc. 90-18, 1990-1 C.B. 491, so that the agency will not be deemed to have knowledge of an address unless certain conditions have been met.

cert. denied, 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984); *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 312 (9th Cir. 1982); and *McPartlin v. Commissioner,* 653 F.2d 1185, 1190 (7th Cir. 1981).

Here, the taxpayers' last known address is 12051 Hallandale Terrace, Mitchellville, Maryland 20716, the address that appeared on their 1987 tax return, mailed on February 7, 1988, and received by the Internal Revenue Service on February 11, 1988. (C.A. App. 75-79). See *Wallin v. Commissioner,* 744 F.2d 674, 676 (9th Cir. 1984); *U.S. v. Zolla, supra.* Indeed, the courts have consistently held that "a subsequently filed tax return with a new address does give the IRS notice" of a change of address. See, *King v. Commissioner,* 857 F.2d 676 (9th Cir. 1988), citing *Wallin, supra.*

Since the Government does not dispute the facts set forth in the Affidavit from the Manager of the Mitchellville-South Bowie Post Office (C.A. App. 60, 61) or the letter from Martin Joyce, Postmaster of the Hyattsville Post Office (C.A. App. 63), it was proper for the court of appeals to review the motion to dismiss filed by the IRS in the light most favorable to the Respondents,[9] and hold that the tax court was clearly erroneous in finding that proper statutory notice was mailed to the taxpayers at their last known address within the meaning of the Internal Revenue Code.

B. The Government did not mail a statutory notice to the taxpayers within the meaning of the Internal Revenue Code.

Section 6213(a) of the Internal Revenue Code[10] makes it clear, that " . . . no assessment of a deficiency in

[9] See, *Wallin v. Commissioner,* 744 F.2d 674 (1984).

[10] 26 U.S.C. Section 6213(a).

respect of any [income tax] . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer . . ." Once again, the Government has refused to observe the law. The evidence in this case shows that the Postal Service never attempted delivery of Parcel 22454.[11]

The facts in the instant case are not unlike those in *McPartlin v. Commissioner, supra,*[12] a case where the Court of Appeals for the Seventh Circuit held that the taxpayers' petition for redetermination filed more than a year after the notice of deficiency was mailed was timely because the IRS had not sent a statutory notice of deficiency to the taxpayers at their "last known address" so as to trigger the ninety (90) day period for filing a petition with the Tax Court where (a) the taxpayers disclosed their change of address to the IRS by way of a subsequent return, (b) the taxpayers did nothing to conceal their address change, and (c) the Commissioner's file on the taxpayers did not contain a return receipt for the notice of deficiency.

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[11] See, the Affidavit of Roger Keith Ballard, Manager of the Mitchellville-South Bowie Post Office (serving Mitchellville, Maryland) dated May 18, 1989 (C.A. App. 60-61.) and the letter from Martin Joyce, Postmaster of the Hyattsville Post Office (serving Adelphi, Maryland) dated May 31, 1989 (C.A. App. 63).

[12] The instant case is distinguishable from *Keado v. Commissioner,* 853 F.2d 1209 (5th Cir. 1988) because here the Internal Revenue Service did not mail notice to the appellants' correct address and the appellants in this case have made diligent efforts to challenge the wrongful assessment. Here, the taxpayers filed their petition for redetermination before having actual notice of an alleged deficiency and almost immediately after receiving the final notice giving them reason to believe an assessment had been made. See, footnote 26 in *Keado, supra.* See also, *Mulder v. Commissioner,* 855 F.2d 208 (5th Cir. 1988), a decision handed down by the Fifth Circuit eighteen (18) days after *Keado,* citing *McPartlin, supra,* with approval.

Like the taxpayers in *McPartlin, supra,* the Respondents in this case filed a proper change of address with the United States Postal Service. The Respondents advised the IRS of their new address in early February of 1988, when they filed their income tax return for 1987. But "When evidence indicates that a notice of deficiency has not been received by the taxpayer due to error of the Postal Service, the notice shall be found insufficient." *McPartlin, supra,* citing *Estate of McKaig v. Commissioner,* 51 T.C. 331 (1968). Even though the Commissioner is authorized by the Internal Revenue Code[13] to send a notice of deficiency by certified or registered mail, the Commissioner does not have a return receipt evidencing delivery or attempted delivery of the statutory notice in this case.[14] Therefore, the taxpayers are entitled to a presumption of non-delivery, a risk assumed by the Commissioner.

III.

THE IRS FAILED TO USE REASONABLE DILIGENCE IN ITS EFFORTS TO ASCERTAIN THE TAXPAYERS' LAST KNOWN ADDRESS.

The failure of the Internal Revenue Service to comply with the law can not be excused here. The Commissioner must exercise reasonable diligence to ascertain a taxpayers' "last known address." *Delman v. Commissioner of Internal Revenue,* 384 F.2d 929, 932 (3rd Cir. 1967), *cert. denied* 390 U.S. 952, 88 S.Ct. 1044, 19 L.Ed.2d 1144 (1968); *O'Brien v. Commissioner,* 62 T.C. 543, 550 (1974); *Alta Sierra Vista, supra,* at 374. *Fernandez v. Commissioner,* 54 T.C.M. 1036 (1987). See, also,

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[13] 26 U.S.C. Section 6212(a).

[14] No presumption of delivery attaches to certified mail. See, *Mulder, supra,* citing *McPartlin, supra.* Therefore, the Commissioner assumed the risk of non-delivery.

Graffan v. United States, 563 F. Supp. 39 (1983). However, the agency failed to do this in the instant case.

To determine whether the Commissioner discharged his obligation to reasonably ascertain a taxpayer's "last known address" is a question to be resolved upon the facts and circumstances of each case. *O'Brien, supra; Lifter v. Commissioner,* 59 T.C. 818, 821 (1973). If one focuses on the information available to the IRS at the time the notice of deficiency was issued, as directed by *King v. Commissioner,* 88 T.C. 1042 (1987) and *Pyo v. Commissioner,* 83 T.C. 626 (1984), it becomes clear that the IRS could easily have located the Respondents in the instant case. All the agency had to do was look at the taxpayers' most recent return before mailing a statutory notice.[15] See, e.g., *Monge v. Commissioner,* 93 T.C. 22 (1989), and *Cohen v. Commissioner,* 57 T.C.M. 804 (1989).

Just as the IRS in *McPartlin, supra,* was able to locate the taxpayers when it sought to levy on their property, it was able to contact the Respondents in the instant case for purposes of levy. This alone is enough to suggest that the agency could have communicated with the Respondents at an earlier time if it had so chosen. As the United States District Court for the District of Colorado observed in *Tangren v. Milbachler,* 522 F. Supp. 701 (1981) (another case where the Postal Service failed to forward to taxpayers certified letters from the IRS and returned the articles to the agency marked "unclaimed,") the IRS should have made an effort to locate the Respondents rather than merely standing by. See, also,

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[15]The Commissioner concedes that the IRS received the taxpayers' 1987 tax return bearing a new address before the agency directed a notice of deficiency to a former address of the taxpayers. See, Petition for Writ of Certiorari at 4.

Kennedy v. United States, 408 F. Supp. 619, 624 (W.D. Mich. 1974), *aff'd. mem.*, 556 F.2d 581 (6th Cir. 1977).

In *Wallin v. Commissioner,* 744 F.2d 674 (9th Cir. 1984), the Court noted that the IRS has the capability to perform a computer search using the taxpayers' social security numbers, and observed that government agents in that case had asked the post office for a forwarding address, and checked with the motor vehicle department of the taxpayer's home state. In *King v. Commissioner,* 88 T.C. 1042 (1987), the tax court advised that an agent should have inquired at the taxpayer's workplace in order to locate him. In *Eschweiler v. United States,* 696 F. Supp. 327 (N.D. Ill. 1988), the court protected the government's interests only upon a showing that the agent had obtained a copy of the taxpayers' rental agreement and contacted the taxpayers' attorney for an exact address. Common sense dictates that the IRS at least dial information for a taxpayer's telephone number and current address. Indeed, to facilitate better record keeping, the IRS could have taxpayers mark the envelopes in which they mail in their returns to indicate whether the return address is a new one.[16] Any of these approaches would have led the IRS directly to the taxpayers in this case, who, like the appellants in *McPartlin, supra,* did nothing to conceal their new address and, in fact, had supplied their address to the IRS in a subsequent tax return.

In *Ward v. Commissioner of Internal Revenue,* 907 F.2d 517 (5th Cir. 1990), the Fifth Circuit held that the taxpayers would not be punished for the administrative difficulties of the IRS. If this Honorable Court were to reject the address appearing on the taxpayers' 1987 tax return as their "last known address", it would

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[16] This is an approach taken by a number of national credit card companies and other businesses that need updated mailing addresses.

reward the IRS and Postal Service for their inefficiency and penalize innocent taxpayers for filing an early return.

IV.
THE PURPORTED TAX ASSESSMENT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

This case is controlled by the three-year statute of limitations found at Section 6501(a) of the Internal Revenue Code.[17] This limitations period runs from the date the taxpayer files his return for the year in question. Since the Respondents filed their 1984 tax return sometime in the latter part of March of 1985, the statute ran in March of 1988. But since the IRS did not send proper notice to the taxpayers before the statute ran, the IRS is now barred from taking any action against the Respondents for tax year 1984. See, *Mulvania v. Commissioner*, 769 F.2d 1376 (9th Cir. 1985); see, also, *Roszokos v. Commissioner*, 850 F.2d 514 (9th Cir. 1988) (misaddressed notices of deficiency are null and void).

V.
THE DECISION IN THIS CASE DOES NOT THREATEN THE PUBLIC FISC.

The Commissioner argues, *inter alia*, that "the decision in this case . . . threatens significant injury to the public fisc." Nothing could be further from the truth. Any threat posed to the Treasury by this case was wrought by governmental ineptitude, not taxpayer misconduct.

Furthermore, as the Commissioner points out in Footnote 7 of his petition for a writ of certiorari, the Internal Revenue Service has promulgated a new Revenue Procedure to better protect the interests of the Government

[17] 26 U.S.C. Section 6501(a).

in notice disputes. See, Rev. Proc. 90-18, 1990-1 C.B. 491. To accomplish this, the Internal Revenue Service now defines a taxpayers' "last known address" as the address appearing on either the taxpayer's most recently filed *and processed* return or a new instrument called Form 8822. The new Revenue Procedure also gives the Internal Revenue Service a generous amount of time in which to process the new information before knowledge of the change of address is chargeable to the agency.

Assuming that the new Revenue Procedure passes statutory and constitutional muster,[18] this new rule will address the administrative inefficiencies of which the Commissioner complains.

VI.
THE COMMISSIONER'S APPROACH WOULD DENY THE TAXPAYERS DUE PROCESS OF LAW.

The IRS should never have taken any collection action against the taxpayers in this case following the compromise by and among the parties in 1986. At the trial level, both the tax court and the district court failed to protect the taxpayers. The tax court claimed lack of jurisdiction over the case. The district court simply refused to act.[19] On appeal, the fourth circuit decided the case on statutory grounds and did not reach the constitutional issue raised by the Respondents. Throughout this controversy, the Respondents have argued that the assessment and collection of allegedly unpaid taxes by the Commissioner of Internal Revenue involves the taking

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[18] Arguably, the Internal Revenue Services' grant of additional processing time to itself violates the statute of limitations set forth at 26 U.S.C. 6501(a).

[19] See, C.A. App. 166.

of property from a taxpayer. Thus, adequate notice to the taxpayer prior to such assessment and collection is required under the Due Process Clause of the Fifth Amendment of the United States Constitution. Due process includes the right to notice and an opportunity to be heard before a deprivation of property may be effected. Indeed, notice and a hearing must be provided at a time when deprivation can still be prevented, since no later hearing can unto an arbitrary taking. *Fuenes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

This requirement of adequate notice is no mere abstract principle. Its purpose is to guarantee fundamental fairness. As stated by the Supreme Court in *Fuentes; supra:*

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the *fair process* of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. 407 U.S. 67, 81 (Emphasis supplied).

Thus, any statute intended to fulfill the constitutional requirement of notice must be fair on its face and realistically fair as applied to an individual whose property is subject to being taken.

Where the Internal Revenue Service has determined a deficiency in payment of a person's income tax, the due process requirement of notice and hearing is embodied in Sections 6212 and 6213 of the Internal Revenue Code.[20] To make certain that taxpayers receive this important notice, the law allows the Internal Revenue Service to send notice of any determined deficiency to the taxpayer by certified or registered mail.[21]

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[20] 26 U.S.C. Sections 6212, 6213.

[21] 26 U.S.C. Section 6212(a).

Sections 6212 and 6213 reflect Congress' attempt to provide constitutionally acceptable procedures for the determination and collection of claimed tax deficiencies. It follows that the statutes must be followed in a manner which provides *effective* notice. Indeed:

> If the mailing of a notice of deficiency to a taxpayer is to be any more than an empty gesture, there should be some reasonable expectation that the taxpayer will receive it.
>
> The purpose of the notice of deficiency is to notify the taxpayer of a deficiency in tax and the proposed assessment of that deficiency within time for petitioner to file a timely petition to the [Tax] Court. *O'Brien v. Commissioner, supra,* at 550.

Here, the Respondents have been barred from challenging the purported tax assessment in the tax court solely because of the Government's failure to send them a timely statutory notice at their last known address.

As the court noted in *Alta Sierra Vista, supra,* deficiency notices only pass constitutional muster when "the Commissioner actually provided the [taxpayers] with prompt and *fair* notice of the deficiencies. *Notice is the gist of the statute.*" (Citations omitted; emphasis supplied.)

Insofar as the taxpayers' right to contest the tax assessment in controversy has been impaired, their fundamental rights have been affected. The courts have long recognized that ready access to the courts is a "fundamental constitutional right." *Ruiz v. Estelle,* 679 F.2d 1115, amended in part, vacated in part 688 F.2d 266 (1982), *cert. denied,* 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). And regulations and practices

that unjustifiably obstruct ready access to the courts are invalid. *Id*; See, also, *Procunier v. Martinez*, 416 U.S. at 419, 94 S.Ct. at 1814, 40 L.Ed.2d at 243 (1974); *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).

Here, the Commissioner contends that the Respondents would not be harmed if the notice in this case were found to be viable because they "may still contest [their] liability by paying the tax and bringing a refund suit in federal district court or the Claims Court." But this approach would be fundamentally unfair. The IRS would be permitted to collect on taxes that are time-barred. However, the innocent respondents would be time-barred from filing a petition with the tax court, the only form to which they can turn without having to pay the illegal assessment before seeking a refund. This approach would be financially devastating to the Respondents and the thousands of other taxpayers whose property would be subject to confiscation by the IRS. The Commissioner's approach would also force taxpayers such as the Respondent to produce documents and testimony relating to financial transactions that took place as far back as 1984. This is precisely what Section 6501(a) of the Internal Revenue Code was intended to protect taxpayers against.

In the final analysis, fundamental fairness is the issue. The notice of the 1984 tax assessment demanded by Section 6212 and by the Due Process Clause of the Fifth Amendment was *never* received by the taxpayers until sometime in 1989 during informal discovery. The taxpayers filed their petition with the tax court immediately after receiving the levy notice. The taxpayers would have appealed the assessment sooner if the Govern-

ment had given them notice thereof. In the words of Justice Frankfurter:

> [F]airness can rarely be obtained by a secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him an opportunity to meet it. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring).

It is precisely that "instrument for arriving at truth" – notice and opportunity for hearing – that has been unfairly denied the Respondents in this case.

CONCLUSION

For the reasons stated above, it is not necessary for this Honorable Court to review this case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 6, 1992

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

5th Amendment, U.S. Constitution

No person shall . . . be deprived of life, liberty, or property without due process of law . . .

26 U.S.C. Section 6212. Notice of deficiency.

(a) In general. If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency.

(1) Income and gift taxes and certain excise taxes. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return. In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the

single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further deficiency letters restricted.

(1) General rule. If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(d) Authority to rescind notice of deficiency with taxpayer's consent. The Secretary may, with the consent

of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

26 U.S.C. Section 6213(a) – Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the

beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

26 U.S.C. Section 6501(a) – Limitations on assessment and collection.

(a) General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was stamp filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. Section 7122 – Compromises.

(a) Authorization. The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record. Whenever a compromise is made by the Secretary in any case, there shall be placed on file in the

office of the Secretary the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of –

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(c) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500.

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No. 92-452

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CLAYTON J. POWELL AND DARLENE W. POWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In opposing the petition, respondents raise three issues that were not considered or addressed by the court of appeals.

1. As discussed in the petition (Pet. 6 & n.7), the court of appeals did not address respondents' assertion (Br. in Opp. 9-10) that the notice of deficiency issued on February 29, 1988, was not mailed to the taxpayers' "last known address" because it was not mailed to the "new" address shown on the return they filed with the Service on February 11, 1988. The court of appeals accepted, for purposes of its decision, the Tax Court's conclusion that the "new" address shown on the return filed in 1988 was not received in sufficient "time for the Service to have posted that new address" before issuing the notice of deficiency (Pet. App. 13a). See Pet. App. 9a. That

conclusion comports with the consistent view of the courts of appeals that the Service must be allowed "a reasonable time for processing" before new information is attributed to the agency in issuing notices of deficiency. *Williams* v. *Commissioner*, 935 F.2d 1066, 1068 (9th Cir. 1991); see Pet. 6 & n.7.

In this case, however, the court of appeals concluded that the notice of deficiency was invalid for two entirely different reasons. Without disputing that the notice was mailed to the "last known address" reflected in the Service's records, the court concluded that the notice was invalid (i) because it was not in fact *received* by the taxpayers and (ii) because, with information obtained *after* the notice was mailed, the Service could, through "reasonable diligence," have discovered the taxpayers' correct address (Pet. App. 7a-8a). These holdings conflict with numerous other decisions. The conclusion that actual *receipt* is required for the notice to be valid is inconsistent with the plain language of the statute (26 U.S.C. 6212 (b)(1)) and with *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988), and *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also Pet. 11-13. The further conclusion that information obtained *after* the notice is mailed may retroactively invalidate the notice conflicts with *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *Pomeroy* v. *United States*, 864 F.2d 1191, 1193-1195 (5th Cir. 1989), and *Brown* v. *Lethert*, 360 F.2d 560, 561 (8th Cir. 1966). See also Pet. 14-16.

Respondents do not seriously dispute that the decision in this case conflicts with those decisions. Instead, in describing the conflicting decisions, respondents point to *irrelevant* legal propositions set forth in

each decision and contend that those *irrelevant* holdings do not conflict with the decision in this case. For example, respondents note (Br. in Opp. 7-8) that in *King* and *Pomeroy* the courts held that a taxpayer's "last known address" is the address on his most recent tax return which, in those cases, had been received and processed by the Service. While respondents' description of those decisions is correct as far as it goes, it does not go far enough. In *Pomeroy*, for example, the court of appeals further held that the question whether a notice of deficiency was mailed to the taxpayer's "last known address" is to be determined by considering "the information available to the IRS *at the time it issued the notice of deficiency*." 864 F.2d at 1195 (quoting *Mulder* v. *Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988)). Similarly, in *King*, the court stated that "[n]othing in the statute suggests that the IRS is obligated to take additional steps to effectuate delivery if the notice is returned; indeed, a notice mailed to the last known address is sufficient *even if it is never received*" (857 F.2d at 681 (emphasis added). These holdings, as well as the holdings of the cases cited above, squarely conflict with the decision in this case.

2. Respondents contend that the conflict created by the decision in this case need not be addressed because, in respondents' view, no taxes are owed in any event. Respondents claim that they owe no taxes because "the parties entered into a final settlement in accordance with the Internal Revenue Code" (Br. in Opp. 6). That assertion, which obviously goes to the merits of the underlying dispute, has not been presented to or considered by either court below. It is a claim that respondents properly may address in further proceedings, but it is not properly presented to this Court in the first instance. While we strongly

disagree with respondents' assertion that its tax liabilities have been settled,[1] that claim on the merits is not at issue at this stage of the litigation.

Indeed, under the decision of the court of appeals, the merits of respondents' liability for these taxes will *never* be at issue. As respondents observe (Br. in Opp. 15), if the notice of deficiency issued by the Commissioner on February 29, 1988, is invalid, collection of respondents' associated tax liability is now barred by the statute of limitations. It is precisely for that reason that the decision in this case threatens significant injury to the routine administration of the federal income tax. By jeopardizing the normal collection of revenues from the hundreds of thousands of delinquent taxpayers each year who change their places of residence, the decision of the court of appeals meaningfully impairs the statutory scheme for the assessment and collection of taxes and threatens significant injury to the public fisc.[2]

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[1] The payment of $472.69 that respondents claim (Br. in Opp. 2) was made as a final settlement of their tax liabilities had no relationship to the deficiency asserted by the Commissioner in the notice issued on February 29, 1988. That notice arose from a partnership in which respondents held an interest (C.A. App. 14). No settlement concerning that deficiency was reached. Since no "closing agreement" (26 U.S.C. 7121) was made for the year of that deficiency, assertion of that deficiency is not barred by any prior settlement reached concerning *other* deficiencies previously identified for that same year. See *Smith* v. *United States*, 850 F.2d 242 (5th Cir. 1988).

[2] Respondents assert that Revenue Procedure 90-18, 1990-1 C.B. 491, may alleviate the significant administrative problems created by the decision in this case *if* the Procedure "passes statutory and constitutional muster" (Br. in Opp. 16). That assertion makes no sense, for the Revenue Procedure only gives notice of the time that the Service requires to input

3. Respondents erroneously contend (Br. in Opp. 16-20) that due process requires that the notice of deficiency be received by the taxpayers for it to be effective. They contend that actual receipt of the notice is constitutionally required so that they may challenge their tax liability in the Tax Court *before* the taxes are assessed and collected, instead of in a refund action in the district court or the Claims Court. This claim has often been raised and has consistently been rejected. See, *e.g.*, *Morse* v. *IRS*, 635 F.2d 701 (8th Cir. 1980); *Lewin* v. *Commissioner*, 569 F.2d 444 (7th Cir.), cert. denied, 437 U.S. 904 (1978); *Wilson* v. *Commissioner*, 564 F.2d 1317 (9th Cir. 1977), cert. denied, 439 U.S. 832 (1978); *Berger* v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962).[3] The loss of the opportunity to have an in-

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change of address information into its computer records. See Pet. 6-7 n.7. The court of appeals specifically chose not to address that issue in this case. See Pet. 6 & n.7. Moreover, nothing in the Revenue Procedure has any bearing on the court of appeals' erroneous conclusions (i) that the notice of deficiency must be *received* by the taxpayer to be effective or (ii) that the Service must diligently consider information obtained *after* the notice is issued (such as returned mail) for the notice to be valid under the statute (Pet. App. 7a).

[3] For example, in *Lewin*, the Internal Revenue Service sent a notice of deficiency by certified mail to the taxpayer's home. The letter carrier tried to deliver it, but no one answered the door. A postal service form was left to indicate that the mail would be held at the post office. But the taxpayers, claiming that they never received the form, failed to pick up the mail and it was returned to the Internal Revenue Service unclaimed. The court rejected the taxpayers' argument that the mailing of the deficiency notice was defective because it was never received; the court further held that the absence of

come tax liability determined before the tax is paid does not violate due process because "Congress, if it chose to do so, could have required the taxpayer to pay first and then litigate, in all cases." *Cohen* v. *United States*, 297 F.2d at 772. See *Phillips* v. *Commissioner*, 283 U.S. 589, 599 (1931) ("the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount").

In any event, this claim (along with the other claims raised by respondents in their brief in this Court) was not addressed or considered by the court of appeals. The issues that the court of appeals *did* address were decided by it in a manner that conflicts with decisions of other courts of appeals and threatens recurring, significant injury to the routine collection of taxes.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

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delivery did not violate due process. The court explained that "[p]ersons in the taxpayers' position have the constitutionally adequate remedy of paying the tax and then instituting a refund suit, with the result that failure to receive the deficiency notice, where there has been compliance with the statutory procedures for notice, and the consequent loss of access to the Tax Court violates no constitutional safeguards." 569 F.2d at 445.

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